Supreme Court, U.S.
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No. 94-1530

In The

Supreme Court of the United States

October Term, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT

John C. Weisensell,
Counsel of Record
Andrew R. Duff
Jack Morrison, Jr.
AMER CUNNINGHAM BRENNAN CO., L.P.A.
Sixth Floor, Society Building
159 South Main Street
Akron, Ohio 44308-1322
(216) 762-2411
Attorneys for Respondent

The Victor Printing & Publishing Co., Akron, Ohio — 216-945-4090

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QUESTION PRESENTED FOR REVIEW

Whether an Order of a District Court remanding on jurisdictional grounds under 28 U.S.C. § 1447(d) a case which had been removed under 28 U.S.C. §§ 1446 and 1452 is reviewable by the Court of Appeals.[1,2]

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[1]Plaintiff–Respondent Petrarca has restated the Question Presented for Review based upon Petrarca's position, as set forth in greater detail infra, that by not appealing from the Bankruptcy Court's holding that the "bankruptcy removal" was not timely, Petitioner has waived its right to seek further review of that issue even if the District Court remand Order is appealable. Further, it is Petrarca's position that given the statutory language of §§ 1447 and 1452, this case was clearly remanded on jurisdictional grounds under § 1447 and not under § 1452 as Petitioner contends.

[2]This Court must also determine whether Petitioner properly preserved its right to make this appeal and whether Petitioner has waived its right to make this appeal by prosecuting in the state courts the issues which Petitioner contends must be litigated in the federal system.

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THINGS REMEMBERED, INC.,

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ANTHONY A. PETRARCA,

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

JURISDICTION

Despite the Court's grant of the Petition for Writ of Certiorari, Respondent respectfully submits that this Court should find, in deciding the case on the merits, that neither the Sixth Circuit nor this Court has jurisdiction

to review the District Court Order pursuant to 28 U.S.C. § 1452(b), 28 U.S.C. § 1447(d) and this Court's previous decisions in *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331 (1976), and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

STATEMENT OF THE CASE

Plaintiff-Respondent Anthony A. Petrarca (hereinafter "Petrarca") commenced this action by filing his Complaint in the Summit County, Ohio Court of Common Pleas on March 18, 1992. Petrarca's Complaint named Child World, Inc. (hereinafter "Child World") and Cole National Corporation (hereinafter "Cole") as Defendants.[3] Petrarca's Complaint sets forth four counts. The first count

[3]Things Remembered, Inc. (hereinafter "TRI") purported to enter into the Summit County action "as a successor by merger to Defendant Cole National Corporation" and has asserted in all Courts since that time that TRI "is successor in interest by merger to Cole National Corporation." *See e.g.* Petitioner's Brief at 3, n.1.

is a claim for money damages against Child World as lessee and Cole as guarantor based upon Child World's breach of a lease between Petrarca and Child World in Denver, Colorado. The second count is a claim against Child World as lessee and Cole as guarantor for future rents pursuant to that Denver lease. The third and fourth counts assert claims against Child World only and are not involved in this appeal.

On May 6, 1992, Child World filed its petition pursuant to Chapter 11 of Title 11, United States Code, in the United States Bankruptcy Court for the Southern District of New York, Case No. 92B20887.

On May 11, 1992, Child World filed in the Summit County action a suggestion of stay. On May 22, 1992, the Court entered an Order transferring the case to the inactive docket as to Child World only.

TRI filed an Answer on May 28, 1992. TRI did not assert in its Answer that the case should properly be in Federal Court. Next, TRI noticed and took two

depositions, one of a non-party witness and one of Plaintiff Petrarca.

On June 26, 1992, TRI filed its Amended Answer and Counterclaims. TRI asserted Counterclaims against Petrarca and also joined an additional Counterclaim Defendant Colfax Manor Gardens ("Colfax"), previously not a party to the action, and asserted purely permissive Counterclaims against Colfax. TRI asserted in its Counterclaim four counts for declaratory judgment raising issues virtually identical to those raised by Petrarca's original Complaint but relating to four additional leases between Petrarca and Child World and Cole guaranties of those leases. Obviously, TRI did not allege in its Amended Answer and Counterclaims that this action could only be litigated in Federal Court.

The parties proceeded with discovery until on August 28, 1992, Petrarca filed his First Amended Complaint bringing five more guaranty claims against TRI and Cole raising identical issues previously raised by Petrarca's original Complaint and by TRI's Counterclaim. Two of the properties which are the subject of

Petrarca's First Amended Complaint had previously been placed in issue by TRI's Counterclaim.

On September 15, 1992, TRI filed in the Court of Common Pleas, Cuyahoga County, Ohio a separate Complaint for declaratory relief against Petrarca and other Defendants seeking declaratory judgment upon two additional Cole guaranties of Child World leases raising issues similar to, although not identical to, the issues raised in this litigation but as to still more properties (hereinafter *"TRI vs. BGTV"*). Again, obviously, TRI did not allege in *TRI v. BGTV* that those claims could only be litigated in Federal Court.

On or about September 25, 1992, TRI filed its untimely Notice of Removed Action in the Court of Common Pleas, Summit County, Ohio, indicating that the case had been removed to the United States District Court, Northern District of Ohio and indicating further that the case had been removed **only pursuant to 28 U.S.C. § 1446(d)**. On or about the same day, TRI filed in the United States District Court for the Northern District

of Ohio and in the United States Bankruptcy Court for the Northern District of Ohio two separate and untimely Notices of Removal indicating that the case had been removed pursuant to 28 U.S.C. §§ 1331, 1334(b), 1441, 1446, 1452 and Bankruptcy Rule 9027. Petrarca filed in the District Court and in the Bankruptcy Court virtually identical Motions to Remand and Motions for Costs.

TRI filed both in the District Court and in the Bankruptcy Court Memoranda in Opposition to Petrarca's Motions to Remand. TRI then filed only in the Bankruptcy Court a Motion to Transfer Venue and a Memorandum in Support requesting the Bankruptcy Court to transfer venue of this case to the United States Bankruptcy Court for the Southern District of New York. Petrarca filed a Brief in Opposition and TRI filed a Reply Memorandum.

On June 25, 1993, the Bankruptcy Court entered its Memorandum of Decision on Motion to Remand and Motion to Transfer Venue. The Court found and held that TRI's removal to the District Court

under the general removal statute, 28 U.S.C. § 1446, was proper; however, the Court also found and held "that the removal to [the bankruptcy] court was untimely." (J.A. 12a.)

Petrarca timely appealed to the United States District Court. **TRI did not appeal from any aspect of the Bankruptcy Court's Memorandum of Decision or the Court's Order.** Upon consideration of Petrarca's appeal, the District Court reversed. Relative to the federal question removal, the District Court held that the September 25, 1992, Notice of Removal "was plainly without the thirty-day period for removal provided by § 1446(b)." (J.A. 27a.) The District Court then went on to affirm the Bankruptcy Court's holding that TRI had failed to timely remove the case under the bankruptcy removal provisions of 28 U.S.C. § 1452 and Bankruptcy Rule 9027. In so doing, the District Court reversed the Order of the Bankruptcy Court only insofar as the Bankruptcy Court had held that TRI's removal under the general removal statute was proper. The District Court remanded the case to the Bankruptcy

Court for further proceedings consistent with the District Court Order.

TRI appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit ordered TRI to show cause why the appeal should not be dismissed since, "[a]s a general rule, an order remanding an action to a state court from which is (sic) was removed is not reviewable on appeal or otherwise. 28 U.S.C. §§ 1447(d) and 1452(b); * * * [Citations omitted.] * * * It does not appear, therefore, that the order of the district court is an appealable order." (J.A. 34a.)

The parties briefed the show cause Order, and the Sixth Circuit then dismissed the appeal. The Sixth Circuit held: "The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed within the time required by 28 U.S.C. § 1446(b). Thus, section 1447(d) prohibits review of that ruling. [Citations omitted.]" (J.A. 36a.) Relative to the bankruptcy removal, the Sixth Circuit held: "In

addition, the district court held that the notice of removal pursuant to § 1452 was not timely filed. Appellate review of that ruling is likewise barred. [Citations omitted.]" (J.A. 36a.)

TRI then petitioned the Sixth Circuit for rehearing and rehearing en banc. In response, on January 12, 1995, the Sixth Circuit entered an Order concluding "that the issues raised in the petition were fully considered upon the original submission and decision of the case." (J.A. 38a.)

On January 20, 1995, TRI filed as Plaintiff in state court in Denver, Colorado, a declaratory judgment action seeking a declaration by the Colorado state court of the rights and liabilities of TRI, Petrarca, and three other party defendants relative to the very same Denver Child World guaranty which was the subject of Petrarca's original Complaint but which TRI argues must be litigated in the federal court system.

On March 10, 1995, TRI filed its Petition for a Writ of Certiorari in this Court.

On March 15, 1995, TRI filed as Plaintiff in state court in Lancaster, Pennsylvania, an Action for Declaratory Judgment seeking a declaration by the Pennsylvania state court of the rights and liabilities of TRI, Petrarca, and three other party defendants relative to a Cole guaranty of Child World's obligations under a lease of a Child World store in Manheim Township, Pennsylvania. That Manheim Child World guaranty had been first placed in issue **in the Summit County, Ohio litigation, the case now pending before this Court, by TRI** in the Second Claim of its Counterclaim filed June 26, 1992. Petrarca also placed the Manheim Child World guaranty in issue in Counts Seven and Eight of his First Amended Complaint filed August 28, 1992. These two counts were included in TRI's improper removals. As with the Denver guaranty, TRI argues to this Court that the Manheim guaranty must be litigated in Federal Court, while at the same time TRI has commenced and is pursuing a declaratory judgment action on that guaranty in state court in Pennsylvania.

SUMMARY OF THE ARGUMENT

Appellate review of remand Orders is barred by 28 U.S.C. § 1452(b). Petitioner's semantic argument is contrary to Congress's intention to restrict judicial review of remand Orders and also creates an anomaly in and of itself. Accepting Petitioner's literal reading of § 1452 requires an interpretation of that statute which does not permit remands on the basis of lack of jurisdiction.

Assuming arguendo that there is a split in the circuits, Congress's intention to restrict judicial review of remand orders is supported by the majority of courts which have addressed the question. In fact, there is even authority out of at least one of the circuits which Petitioner contends supports its argument that remand Orders of bankruptcy removals are not reviewable.

Alternatively, since, under Petitioner's literal reading of § 1452, this case could not have been remanded under § 1452, the proper focus for

reviewability of the remand Order is in fact under 28 U.S.C. § 1447. Section 1447 unequivocally bars all appeals where cases are remanded based upon a lack of jurisdiction. In fact, this Court has already held that it has no authority to hear an appeal of a remand Order.

Finally, this Court should also find and hold that Petitioner did not preserve its right to make this appeal since Petitioner failed to appeal the Bankruptcy Court Order holding that Petitioner's bankruptcy remand was not timely. Additionally, Petitioner has waived its right to make this appeal by commencing and prosecuting in state courts litigation on the very same issues it contends must be litigated in the federal system.

ARGUMENT

I.

APPELLATE REVIEW OF REMAND ORDERS IS BARRED BY 28 U.S.C. § 1452(b).

Title 28 U.S.C. § 1452(b) provides:

> The court to which such claim or cause of action is removed may remand *such claim or cause of action on any equitable ground.* An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, *is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291 or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.* (Emphasis added.)

Subsection 1452(b) only permits a court to remand a claim on an equitable ground, whatever "on any equitable ground" means in the context of that statute. Petitioner does not tell this Court, or even attempt to tell this Court, what "on any equitable ground" means or what Petitioner thinks it means or should mean, but rather, Petitioner simply argues that the interpretations which have been presented by various circuit courts of appeals are clearly incorrect, and "jurisdiction" cannot be "any equitable ground." As discussed below, Congress intended to include "jurisdiction" within the phrase "on any equitable ground." The legislative

history is clear and convincing evidence of Congress's intention to restrict judicial review of remand Orders. Further, Petitioner only desires to literally interpret the second sentence of subsection 1452(b) and completely and totally ignores the first sentence of that subsection. Accepting Petitioner's literal reading of the second sentence of § 1452(b) not only contradicts Congress's intention, but also requires this Court to find that this case was not remanded "on any equitable ground" and therefore is without the provisions of § 1452(b). Therefore, the issue of appealability of the remand Order must be examined under 28 U.S.C. § 1447(d).

A. Congress intended to include "jurisdiction" within the phrase "on any equitable ground."

The phrase "equitable ground" was incorporated into the 1978 Bankruptcy Reform Act. However, the 1978 amendments did not discuss the intended meaning of the phrase "equitable ground." Before 1978 there was a dichotomy of

jurisdiction between the bankruptcy courts and the district courts which the 1978 Bankruptcy Reform Act terminated. S. Rep. No. 989, 95th Cong., 2d Sess. 17 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5803. In 1978, Congress broadened the jurisdiction held by bankruptcy courts to avoid serious delays, expense, and duplications that would occur by dividing claims in one cause of action or completely changing forums. H.R. Rep. No. 595, 95th Cong., 2d Sess. 51 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6012. The House Report stated that the bankruptcy courts were to serve two goals: (1) be a fair and credible forum; (2) be efficiently and quickly operated. H.R. Rep. No. 595, 95th Cong., 2d Sess. 13 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5974. In order to accomplish these goals, Congress decided that

> * * * except where the bankruptcy court abstains from hearing an action or proceeding arising under or related to a case under title 11, all cases under title 11 and all civil actions and proceedings arising under or related to cases under title 11 are to be before the

> bankruptcy judge. S. Rep. No. 989, 95th Cong., 2d Sess. 18 (1978), reprinted at 5804.

Congress broadened the jurisdiction of the bankruptcy courts but this amendment, as noted, did not directly address or define the meaning of "equitable ground."

In the case of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) this Court concluded that the 1978 Act conferring broad subject-matter jurisdiction upon the bankruptcy courts was unconstitutional. S. Rep. No. 55, 98th Cong., 1st Sess. 8 (1983). The bankruptcy courts were intended to be adjuncts to the district courts, but, after 1978, they became more than adjuncts by adjudicating questions of constitutional law and even state law. S. Rep. No. 55.

Congress developed the Bankruptcy Amendments and Federal Judgeship Act of 1984 in response to *Marathon*. The Act of 1984 stipulated that bankruptcy courts would still handle most cases brought before them unless, as in this case, the

cause of action was grounded in state law and the parties did not consent to jurisdiction, or the district court elected to take the suit. 130 Cong. Rec. S 6084 (May 21, 1984) (statement by Sen. Doyle). Congress repeatedly cited to the concepts of equity and fairness by stating:

> If a party to a suit has a wholly State law claim which he wishes to have decided before his local state court, what **principles of equity** dictate that he should be subject to the jurisdiction of a distant Federal court simply because the other party has filed bankruptcy? *Id.*, at S. 6089. (Emphasis added.)

Furthermore, the debates surrounding the 1984 Act centered mostly on the fear of abuse of bankruptcy power. Congress feared that a party would not only use bankruptcy laws to escape state court jurisdiction and deny claimants a right to a fair trial in the appropriate court, **but Congress also feared that, as in this case, parties would litigate the jurisdictional question in order to delay the suit and increase litigation**

expenses. 130 Cong. Rec. S. 7619 (June 19, 1984) (statement by Sen. Heflin).

In fact, the Congressional intent in enacting the 1984 Act was expressly to preserve a litigant's right to have state law issues tried in the appropriate state forum and to avoid the use, as in this case, of "the bankruptcy laws solely to escape state court jurisdiction and deny claimants a right to a fair trial in the appropriate court." *Id.* Congress recognized that, as in this case, "[t]his is an abuse of the bankruptcy power." *Id.* Thus, in the 1984 Act, Congress clarified its intent to include "jurisdiction" as an "equitable ground," and limited the appeals process to the district courts.

The 1990 Judicial Improvements Act adopted many recommendations made by the Federal Courts Study Committee one of which was a clarification of the second sentence of 28 U.S.C. § 1452(b). Both the 1978 and 1984 Acts stated that an Order by the bankruptcy court to remand or not to remand was not reviewable by appeal or otherwise. The Federal Courts

Study Committee recommended that Congress amend 28 U.S.C. §1452(b)

> **'to clarify that they forbid only appeals from the district courts to the court of appeals, not from bankruptcy courts to the district courts.'** Staff of the Federal Courts Study Committee, 101st Cong., 2d Sess., Report of the Federal Courts Study Committee 77 (Comm. Print 1990) (Emphasis added).

This recommendation was obviously accepted. As one can see, Congress has continuously limited the appeals in which jurisdictional issues can be litigated.

Congress intended for jurisdiction to be an "equitable ground" in order to declare district court decisions to remand cases unreviewable by the court of appeals. This is evident by the strenuous debates concerning the unfairness of "jurisdiction by ambush," undue delay and expense, and the effects upon the estate in question of litigation in a different forum. H.R. Rep. No. 595 at 51.

B. Petitioner's literal reading of § 1452 contradicts Congress's intention.

Not only does Petitioner's proposed interpretation of § 1452 contradict Congress's intention to include "jurisdiction" within the phrase "on any equitable ground," but Petitioner's literal reading of section 1452 also presents an anomaly. Petitioner presents the issue as whether or not a remand Order under § 1452 is reviewable before petitioner answers the question of whether or not the case was in fact even remanded under § 1452. If Petitioner's argument is correct, that only Orders remanding cases "on any equitable ground" are not reviewable by appeal or otherwise, and if Petitioner is also correct that "jurisdiction" is not an "equitable ground" as that term is used in the statute, then it also must follow that cases may in fact only be remanded under § 1452(b) "on any equitable ground" and since this case was remanded on jurisdictional grounds, it could not have been remanded pursuant to § 1452(b).

Perhaps the best analysis of the flaw in Petitioner's reasoning appears in *Sykes v. Texas Air Corporation*, 834 F.2d 488 (5th Cir. 1987). As the Court in *Sykes* explained, the position espoused by Petitioner here would create more problems than it would resolve and would also undermine the Congressional policy behind the rule precluding appellate review of remand Orders. If this Court were to accept Petitioner's position, then months, or perhaps even years after a remand Order is entered, if a court of appeals decides that the remand was improper, the case would be

> * * * thrown into confusion and the effort expended by the parties on the state court proceeding (along with a good deal of state judicial resources) [would be] in jeopardy. And if the state case has proceeded to judgment, the subsequent re-removal is for naught as the parties are bound by res judicata. [Citations omitted.]

834 F.2d at 490.

The *Sykes* court also noticed that appellate review of remand Orders is necessarily inefficient since the remand

is either affirmed, thereby rendering the appeal itself a waste of time and judicial resources, or the remand is reversed, in which case any progress made in the state court proceeding is nullified. *Id.*, at 491. Additionally, the *Sykes* court noted the anomaly created by the holding in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984), the case upon which Petitioner principally relies, which drew a distinction between bankruptcy removals and other removals. Under *Pacor*, in bankruptcy removals, only jurisdictional remands and not discretionary remands are reviewable. Under *Pacor*, in all other removals, only discretionary remands and not jurisdictional remands are reviewable. The *Sykes* court stated: "We cannot imagine that Congress actually intended such a perverse asymmetry, nor can we see how it furthers any conceivable congressional goal." *Id.*, at 491. This situation creates a very real possibility for manipulation. Under the theory presented by Petitioner here, a defendant could choose to direct which of two removal routes should be taken and

thereby control the possible grounds for remand and the type of appellate review, if any, that would be available. *Id.*, at 491-492.

Finally, the scope of review under the *Pacor* rule "turns on what the district court *says* it is doing." Where the district court "*says* it is remanding for lack of jurisdiction, the decision--even if flagrantly wrong--is completely unreviewable." However, where the district court *says* that its decision is based upon something other than lack of jurisdiction, then review of that order is available. *Id.*, at 492.

For all of these reasons, in addition to the fact that Congress intended to include "jurisdiction" within the phrase "any equitable ground," it is clear that appellate review of remand Orders is barred by 28 U.S.C. § 1452(b).

C. Petitioner never defines "on any equitable ground."

Although Petitioner argues that § 1452 only bars review of remand Orders "on any equitable ground," Petitioner

never defines or attempts to define the "equitable grounds" under which a case could be remanded thereby precluding appellate review. Petitioner merely states that this case was remanded on "jurisdictional grounds" and therefor was not remanded on "equitable grounds." Petitioner then argues, again without ever having defined "equitable grounds," that since this case was remanded on jurisdictional grounds, it is clearly not included in the language precluding appeal of remand orders under subsection 1452(b).

This Court need not construct an argument placing words into § 1452(b) which are not there as Petitioner contends in order to find that review of this remand Order is precluded by § 1452(b). As described above, Congress intended to include "jurisdiction" within the phrase "on any equitable ground." Again, the legislative history to this effect is clear and convincing and also indicates Congress's intention to restrict judicial review of remand Orders under § 1452(b).

D. Assuming arguendo there is a split in the circuits, Congress's intention has been manifested in decisions by the majority of courts holding that remands under § 1452(b) are not reviewable.

As set forth in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, it is Respondent's position that there is not truly a split in the circuits since the cases upon which Petitioner relies can be distinguished on their facts or by the issues which were actually pending before the courts at the times of their decisions. Nevertheless, assuming for sake of argument that there is a split in the circuits, the majority of courts which have faced the issue have clearly manifested Congress's intention by their holdings that remands under § 1452(b) are not reviewable. Petitioner acknowledges that the Fifth, Sixth, and Seventh Circuits have all held that they do not have authority to hear appeals of remand Orders entered under 28 U.S.C. § 1452(b). See Petitioner's Brief at 11-13. Those cases are *Sykes, supra;*

Hernandez v. Brakegate, Ltd., 942 F.2d 1223 (7th Cir. 1991); and *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056 (6th Cir. 1986). *Sykes* has been discussed above. *Hernandez* also supports the Congressional intent discussed earlier in this section. The *Hernandez* court recognized the anomaly discussed earlier: "If § 1452(b) indeed identifies the only basis of remand, and if as *Pacor* held lack of subject-matter jurisdiction is not an 'equitable' ground, then there is no statutory authority to remand cases removed without jurisdiction. They would have to be dismissed outright." 942 F.2d 1223, at 1225 (7th Cir. 1991).

The Sixth Circuit in *Boone Coal* adopted the reasoning of the Fifth Circuit in *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984), and also echoed the Congressional intent to avoid delay in litigating the issue of propriety of remand orders when it stated: "The court noted that the purpose of making non-reviewable the bankruptcy court's remand order or its decision not to remand <u>was to avoid the delay that would result from litigating remand decisions</u> (citing 1

Collier on Bankruptcy § 3.01, at 3-80.1 - 3-81 (15th ed. 1984))." 787 F.2d 1056, at 1060 (emphasis added).

Only the Third Circuit in *Pacor* and the Eleventh Circuit in *In re National Developers, Inc.*, 803 F.2d 616, 619 (11th Cir. 1986), have drawn the distinction which Petitioner requests this Court to draw. Virtually every other court, whether a Bankruptcy Court, Federal District Court, or Circuit Court of Appeals, which has addressed this issue has refused to hold that orders remanding cases removed under 28 U.S.C. § 1452 are reviewable. *See, In re Adams*, 809 F.2d 1187 (5th Cir. 1987) (holding that court of appeals had no jurisdiction to review District Court's order remanding litigation under section 1452(b)) (This is the further history of the case which Petitioner cites as "[a]n example of a plaintiff's timely removal from a non-state forum court under § 1452." Petitioner's Br. at 20, n. 13); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (Section 1478(b) provides that "[a]n order under this subsection remanding a claim or cause of action or a decision

not so remanding, is not reviewable by appeal or otherwise. * * * The statute plainly prohibits our review of a bankruptcy court's remand order on direct appeal."); *In re Compton*, 711 F.2d 626 (5th Cir. 1983) (action of Federal District Court remanding divorce case to state court after bankruptcy court had exerted removal jurisdiction was not appealable whether the remand was a matter of abstention or was for a perceived want of jurisdiction); *In re Rayburn Enterprises, Inc.*, 781 F.2d 501 (5th Cir. 1986) (appellate court lacked jurisdiction over appeal of district court order remanding to state court an action which had been removed to bankruptcy court regardless of whether the order was viewed as grounded in want of jurisdiction or based on abstention); *Dominick v. Dixie National Life Insurance*, 809 F.2d 1559 (11th Cir. 1987) (It is clear that by virtue of 28 U.S.C. § 1478(b) [the precursor of § 1452(b)] a decision not to remand is not reviewable on appeal.) (It should be noted that *Dominick* is from the same Circuit and later in time than *In re National*

Developers, Inc., one of the two cases upon which Petitioner places primary reliance for its position.); *In re Hanson Industries, Inc.*, 83 B.R. 659 (Bkrtcy. D. Minn. 1988) ("In all cases where the bankruptcy court entered the order of remand, the circuit courts found that the bankruptcy court's decision was appealable to the district court, but not appealable to the circuit court." [Citations omitted.] 83 B.R. 659, at 666-667.); *In re Branded Products, Inc.*, 154 B.R. 936 (Bkrtcy. W.D. Tex. 1993) (Where bankruptcy court lacks jurisdiction, case should be remanded immediately to state court. *Id.*, at 945. No appellate review is available from district court decision remanding case. *Id.*, at 946.); *In re Potts*, 724 F.2d 47 (6th Cir. 1984) (bankruptcy court's refusal to remand case to court from which it was removed was not reviewable).

In summary, appellate review of remand Orders, regardless of the basis, is barred by 28 U.S.C. § 1452(b). Congress intended to include "jurisdiction" within the phrase "on any equitable ground." This legislative

history is "clear and convincing evidence" of Congress's intention to restrict judicial review of all remand Orders, regardless of their context or their basis. Assuming arguendo there is a split amongst the circuits, the weight of authority amongst those Courts which have faced the issue holds that remands under § 1452(b), regardless of the grounds, are not reviewable. The analysis of the issue presented by these Courts is clearly the better reasoned approach. This Honorable Court should hold, consistent with Congress's intention, that remands under 28 U.S.C. § 1452(b), regardless of the basis, are not reviewable by Circuit Courts of Appeals or by this Court. Alternatively, this Court should find that this case was not remanded under § 1452 and move to the analysis presented in Part II of this Brief, that being whether appellate review of remand Orders is barred by 28 U.S.C. § 1447.

II.

APPELLATE REVIEW OF THIS REMAND ORDER IS BARRED BY 28 U.S.C. § 1447.

Again, this Court can and should find and hold that § 1452(b) bars appellate review of this remand Order. Alternatively, the Court should determine, under Petitioner's literal reading of *all parts* of § 1452(b), that this case was *not* remanded pursuant to § 1452(b). In that instance, the analysis shifts to § 1447(d). Also in that instance, this Court can and should find that section 1447(d) bars review of the District Court's Order of remand in this case.

A. Section 1447 bars appellate review when cases are remanded for want of jurisdiction

There is no question that § 1447(d) bars appellate review. It does not contain the language which Petitioner hangs its hat on in § 1452 to say that

jurisdictional remands are reviewable. Subsection 1447(d) provides:

> An order remanding a case to the State from which it was removed **is not reviewable on appeal or otherwise**, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. (Emphasis added.)

The issue in the analysis of application of § 1447 is not whether that section permits review of remand Orders but whether that section can have application to cases removed under § 1452 or under §§ 1452 *and* 1447. The best analysis of the applicability of both sections to a single case appears in *Hernandez, supra*. In *Hernandez* the Seventh Circuit stated:

> Sections 1447 and 1452 belong to Chapter 89 of Title 28. Nothing in text or structure suggests that the general provisions of § 1447 are inapplicable to cases removed under § 1452, any more than they would fall away for removals under § 1442 (federal officers), § 1442(a) (members of armed forces) or other statutes authorizing removal. To

> the contrary, § 1452 relies on other provisions in Chapter 89, which specify the time and procedure for removal. All § 1452(a) does is describe a class of removable cases; it does not say or imply, for example, that removal may occur without the signed petition required by § 1446(a) or after the time specified by § 1446(b). If § 1452(b) indeed identifies the only basis of remand, and if as *Pacor* held lack of subject-matter jurisdiction is not an 'equitable' ground, then there is no statutory authority to remand cases removed without jurisdiction. They would have to be dismissed outright. If filed again in state court, they could be removed again, followed by dismissal. Defendants could immunize themselves from legal process, a most unlikely outcome of § 1452. The statute authorizing remand for want of jurisdiction is § 1447(c), and § 1447(d) bars review of such remands. Both the Supreme Court, *United States v. Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946), and this Court, *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65 (7th Cir. 1991), have held that authorization to remove cases arising out of a particular subject does not imply inapplicability of the general provisions concerning removal. Section 1452 is not an exception to this rule.

942 F.2d 1223, at 1225.

Additionally, the Tenth Circuit recently held in *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321 (10th Cir. 1994), as follows:

> Moreover, the remand provision in section 1452(b) is limited to discretionary remands based on equitable grounds. If this were the only statute to apply, there would be no requirement that cases removed under section 1452(a) be remanded on the purely legal ground that the District Court lacks subject matter jurisdiction. Because § 1447(c) requires such a remand, the statutes cover different contingencies, and should both be given effect. For these reasons, the provisions of 28 U.S.C. § 1447(c) apply to cases removed under § 1452(a) as well.

17 F.3d 321, at 324.

Assuming that § 1447 does apply to bankruptcy removals as the Courts in *Hernandez* and *Daleske* have held, under this Court's own rulings in *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331 (1976) and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), neither a Circuit Court of Appeals nor this Court has jurisdiction to review a District Court Order remanding an action

to state court on grounds permitted within the statute. *Volvo* is particularly significant here insofar as the District Court in *Volvo* found that it was without jurisdiction over the matter and that was the basis for the remand.

B. Removal under special removal provisions does not imply inapplicability of general removal statute provisions.

Finally, as described above, this Court has also held in *United States v. Rice*, 327 U.S. 742 (1946), that the mere authority to remove an action arising out of a particular subject matter does *not* imply the inapplicability of the general statutory provisions concerning removal to those types of cases. Although Petitioner argues that *Rice* was decided prior to enactment of the Bankruptcy Code, *Rice* has been reaffirmed by this Court and followed by various Circuit Courts on many occasions since enactment of the Bankruptcy Code. *See e.g. Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (in

the bankruptcy context); *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65 (7th Cir. 1991); *FSLIC v. Frumenti Development Corp.*, 857 F.2d 665 (9th Cir. 1988) (the FSLIC's special removal statute, 12 U.S.C. § 1730(k)(1), does not make § 1447(d) inapplicable); *In re FSLIC*, 881 F.2d 564 (8th Cir. 1989) (same); *Nasuti v. Scannell*, 792 F.2d 264 (1st Cir. 1986).

III.

PETITIONER DID NOT PRESERVE ITS RIGHT TO MAKE THIS APPEAL WHEN IT FAILED TO APPEAL THE BANKRUPTCY COURT ORDER AND WAIVED ITS RIGHT TO MAKE THIS APPEAL BY PROSECUTING STATE COURT LITIGATION ON ISSUES IT CONTENDS MUST BE LITIGATED IN THE FEDERAL SYSTEM.

This Court and other federal appellate courts have long recognized the proposition that this Court is without jurisdiction to consider an argument not raised in the court below. *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936); *United States v. Socony-*

Vacuum Oil Co., Inc., 310 U.S. 150 (1940); and *Michel v. Louisiana*, 350 U.S. 91 (1955).

In this case, it is clear from the record of each court in which this case has proceeded that TRI attempted to remove this action both under the general removal statute, 28 U.S.C. § 1446, and under the bankruptcy removal statute, 28 U.S.C. § 1452. In fact, the Notice of Removed Action filed in the Summit County Court of Common Pleas indicated that the case had been removed **only pursuant to 28 U.S.C. § 1446(d).**[4] The Bankruptcy Court held that TRI had failed to timely remove this case under the bankruptcy removal statute but that TRI had timely removed the case under the general removal statute. **TRI did not appeal any aspect of that ruling of the Bankruptcy Court.**

Because the bankruptcy judge ordered the case transferred to the United States Bankruptcy Court for the Southern District of New York, Petrarca did appeal

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[4]Arguably, the case was only properly removed under § 1446(d) and the § 1452 issue is not properly before this Court.

the Bankruptcy Court's holding that the case was properly removed under the general removal statute. Now, despite TRI's reliance upon the Bankruptcy Court's holding that it had properly removed the case under the general removal statute, and despite TRI's failure to appeal the Bankruptcy Court's holding that TRI had failed to properly remove the case under the bankruptcy removal statute, TRI desires to have this Court decide the question of whether or not an appeal of an Order remanding a case removed under § 1452 is barred where the remand Order is based on jurisdictional grounds. Since Petrarca appealed the Bankruptcy Court's holding that the case had been properly removed under the general removal provisions, the District Court's Order, in effect, only reversed that portion of the Bankruptcy Court Order and remanded the case under the provisions of 28 U.S.C. § 1447(d).

Section 1447(d) does not include the language which TRI asks this Court to examine and which is contained in § 1452. TRI's argument is misdirected since this case was not remanded under § 1452. TRI

failed to appeal the Bankruptcy Court's earlier holding that the bankruptcy removal was not timely. Therefore, TRI forfeited its right to appeal that question here.

TRI has also waived its right to argue that these issues as between Petrarca and TRI ought to, and can only, be litigated in Bankruptcy Court as a result of TRI's most recent conduct in commencing two separate state court actions seeking to litigate in state court the very same issues involved in this case.

In this regard, not only has TRI waived its right to assert that these issues ought to, and can only, be litigated in Bankruptcy Court, additionally, the question which TRI asks this Court to decide is now moot as a result of TRI's conduct in commencing state court actions in Ohio, Colorado, and Pennsylvania on these very same issues.

Federal Courts are prohibited from deciding moot questions. There must be an actual case or controversy between the parties at the time the issue is

reviewed. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), *reh. den.* 300 U.S. 687 (1937); *North Carolina v. Rice*, 404 U.S. 244 (1971). "[M]oot questions require no answer." *Missouri, Kansas & Texas R. Co. v. Ferris*, 179 U.S. 602, 606 (1900). Further, this Court may refuse to consider unnecessary questions. *Mercer v. Theriot*, 377 U.S. 152 (1964), *reh. den.* 377 U.S. 973 (1964).

In this case, as a result of TRI's voluntary choice to pursue state court remedies on those issues it had previously argued must be litigated in Bankruptcy Court, the issues are moot and it is unnecessary for this Court to decide the issue presented by Petitioner TRI.

CONCLUSION

This Court should find, consistent with the Congressional intent to include "jurisdiction" within the phrase "on any equitable ground," and consistent with the Congressional intent to restrict judicial review of all remand Orders, that 28 U.S.C. § 1452(b) precludes appellate review of the District Court's Order remanding this case to state court either by the Sixth Circuit or by this Court.

In the alternative, this Court should find, accepting Petitioner's "literal" interpretation of § 1452, but literally interpreting all of § 1452 and not only that portion of the statute which Petitioner desires this Court to examine, that § 1452(b) permits remands of bankruptcy removals only "on any equitable ground." Hence, § 1452 does not apply to this action; rather, the District Court remand Order was based on § 1447(d) which unequivocally precludes review of the District Court remand Order either by the Sixth Circuit or by this Court.

This Court could also resolve this appeal by simply finding that Petitioner failed to properly preserve its right to make this appeal or that Petitioner has waived its right to make this appeal by commencing and prosecuting state court litigation in various state court forums on the very same issues which Petitioner contends must be litigated in the federal system.

Respectfully submitted,

John C. Weisensell,
Counsel of Record
Andrew R. Duff
Jack Morrison, Jr.
AMER CUNNINGHAM BRENNAN CO., L.P.A.
Sixth Floor, Society Building
159 South Main Street
Akron, Ohio 44308-1322
(216) 762-2411
Attorneys for Respondent
Anthony A. Petrarca

CERTIFICATE OF SERVICE

Three (3) true copies of the foregoing Brief for Respondent were sent by regular U.S. Mail, postage prepaid, to:

Steven D. Cundra
Thompson, Hine & Flory
1920 N Street, N.W.
Washington, D.C. 20036-1601
202-973-2700
Counsel of Record for Petitioner,
Things Remembered, Inc.

on this 13 day of July, 1995.

John C. Weisensell
John C. Weisensell
Counsel of Record for Respondent,
Anthony A. Petrarca

In compliance with Rule 29.5, all parties required to be served have been served.

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